

G. MARK ALBRIGHT, ESQ.  
Nevada Bar No. 001394  
WHITNEY B. WARNICK, ESQ.  
Nevada Bar No. 001573  
SPENCER M. JUDD, ESQ.  
Nevada Bar No. 010095  
801 South Rancho Drive, Bldg. D  
Las Vegas, NV 89106  
(702) 384-7111 - Telephone  
(702) 384-0605 - Facsimile  
[gma@albrightstoddard.com](mailto:gma@albrightstoddard.com)  
*Attorneys for Creditors, Robert Hey,  
Cheryl Labosco, Michael Panaggio,  
and Al Schmidt*

**E-filed on February 20, 2009**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

|                   |   |                            |
|-------------------|---|----------------------------|
| IN RE:            | } | BAP No. NV-09-1049         |
|                   |   | Appeal Reference No. 09-02 |
| SILVER BEACH LLC, |   | CASE NO. 08-13995-MKN      |
|                   | } | CHAPTER 11                 |
| Debtor.           |   |                            |

**APPELLANTS' DESIGNATION OF RECORD ON  
APPEAL WITH STATEMENT OF ISSUES**

Robert Hey, Cheryl Labosco, Michael Panaggio, and Al Schmidt, Appellants herein, hereby designate the following record for Appeal pursuant to FRBP 8006:

1. Order Granting Debtor/Debtor-in-Possession filed January 26, 2009, docket number 63;
2. Voluntary Petition, filed April 24, 2008, docket number 1;
3. Amended Summary of Schedules, filed May 12, 2008, docket number 13;
4. Amended Summary of Schedules, filed August 26, 2008, docket number 26;
5. Debtor's Motion for An Order Approving Auction Sale of Property Free and Clear of Liens, Claims, and Interests, filed November 25, 2008, docket number 38 - 38-10;
6. Transcript of Proceedings of Motion, filed January 21, 2009, docket number 55;
7. Declaration of David J. Jensen in Support of Motion for Order Approving Auction Sale

- 1 of Assets Free and Clear of Liens, Claims, and Interests and Assignment of Contracts,
- 2 Licenses and Leases, filed November 25, 2008, docket number 39;
- 3 8. Opposition to Motion for an Order Approving Auction Sale of Property Free and Clear
- 4 of Liens, Claims and Interest, filed December 9, 2008, docket number 44;
- 5 9. Reply to Opposition for an Order Approving Auction Sale of Property Free and Clear
- 6 of Liens, Claims and Interest, filed December 24, 2008, docket number 51.

7

8 Appellants, Robert Hey, Cheryl Labosco Ahmed, Michael Panaggio, Al Schmidt and Silver

9 Beach Association, Inc., submit this Statement of Issues on Appeal of the Order authorizing sale

10 entered in the above-referenced Chapter 11 proceedings on January 30, 2009.

# INTRODUCTION

11

12 Order authorized the sale of not only the Debtor's property but also the property of more than

13 100 owners of time share units that had been conveyed to their individual owners by warranty deed

14 long before Debtor acquired its property. The interests of these separate time share unit owners were

15 specifically excluded from the deed to Debtor, Silver Beach, LLC, and were not encumbered by the

16 mortgage given by Debtor to creditor, Northstar. They are separate properties not subject to sale

17 pursuant to 11 U.S.C. Section 363 (b) and (f).

18 1. The trial court erred by determining that the elimination of more than a hundred separate

19 time share units was the proper subject of a Motion pursuant to 11 U.S.C. Section 363(b).

- 20 a. The determination of the nature and extent of an alleged creditor's "claim"
- 21 must be determined by adversary proceedings, not as an ancillary issue in a
- 22 motion hearing. Rule 7001 Bankruptcy Rules.
- 23 b. The time share units owned by third parties are separate, legally recognized
- 24 parcels of real property under Florida law and form no part of the debtor's
- 25 estate. Property in which the debtor does not hold an interest cannot be sold
- 26 pursuant to Section 363.
- 27 c. Time share units are not subject to actions for partition and are not subject to
- 28 involuntary sale pursuant to the Partition Laws of the State of Florida, Section

64.031, Florida Statutes; Section 64.061, Florida Statutes; Section 64.071, Florida Statutes; Section 721.22, Florida Statutes.

2. The court erred by finding the Notice of the Sale Motion was properly served on all interested parties. Notice of the sale was not adequate because numerous time share unit owners are listed by name but without any address. Debtor has made no special showing that it provided notice to "creditors" whose addresses were unknown. Further, the due process considerations of Rule 7001 required that the determination of the extent of the time share unit owners' rights be determined by adversary proceedings in which each owner should have been served with a summons and complaint, and the discovery procedures of an adversary proceedings would have been available.

3. The trial court erred by finding that the Debtor is authorized to terminate the Condominium, Time Share Plan and Master Declarations.

a. Only four (4) condominium units were submitted to time share ownership. Debtor does not own a sufficient number of time share units to terminate the time share plan. Chapter 721, Florida Statutes, did not provide a method of termination, and the Debtor has not complied with, and cannot comply with, the requirements of the Time Share Plan to terminate time share ownership of any unit.

b. Only twelve (12) condominium units were established in Silver Beach Village, a condominium. Debtor does not have control of a sufficient number of condominium units to terminate the condominium. Section 718.117, Florida Statutes, required unanimous consent.

c. The master declarations and facilities agreements do not permit their unilateral termination, so Debtor did not have the power to terminate these documents by merely voting its interest for termination.

4. The court then erred because the Sale Motion should not have been granted under either 11 U.S.C. Section 363(f) or 11 U.S.C. Section 363(f)(5). The trial court takes as its authority Sections 64.031 and 64.061, Florida Statutes.

a. Section 64.031, Florida Statutes, states that "The action [in partition] may be

1 filed by any one or more of several joint tenants, tenants in common or  
2 coparceners, against their co-tenants, coparceners or others interested in the  
3 lands to be divided. Owners of time share units are not joint tenants, tenants  
4 in common or coparceners and are not subject to partition because time share  
5 units are a legally recognized separate and independent units of real property  
6 ownership, if so designated in the Declaration of Time Share, as was done in  
7 the case of Silver Beach Village.

- 8 b. The trial court cites Section 64.061, Florida Statutes, that refers to the  
9 appointment of commissioner to determine the boundaries of the partition but  
10 includes a provision for sale if it is *uncontested* that the property sought to be  
11 partitioned is indivisible. In the present case the sale was contested. If the  
12 Debtor seeks to partition the condominium unit, then it has already been  
13 divided into time share units. No partition sale would therefore be appropriate.
- 14 c. Appellant believes that the trial court may have sought to refer to Section  
15 64.071, Florida Statutes, that authorizes the sale of property where partition is  
16 determined to be impractical. Section 64.071, Florida Statutes, does contain  
17 the specific requirement that sale is only permitted "If the commissioners report  
18 that the lands of which partition is directed are so situated that partition cannot  
19 be made without prejudice to the owners and the court is satisfied that such  
20 report is correct..." Again as to individual condominium units in Silver Beach  
21 Village, four (4) have already been divided into time share units, so subdivision  
22 has not only been determined to have been practical but it has long been carried  
23 out. Section 721.22, Florida Statutes, further states that, "No action for  
24 partition of any time share unit shall lie, unless otherwise provided for in the  
25 contract between the seller and the purchaser." Therefore no action for  
26 partition of a time share unit is permitted by Florida law.

27 5. The trial court incorrectly finds that the liens, claims, or interests in the property  
28 assert by other parties, including the objecting parties, are in bona fide dispute. The ownership rights

1 and obligations of the parties, however, are clearly established by law. The ownership of the time  
 2 share units is authorized by Florida law and is recognized as a separate parcel of property. In the  
 3 present case 168 separate parcels were conveyed by warranty deed to their individual owners. The  
 4 Debtor has no claim to any of those time share units, unless it has repurchased some of them as Debtor  
 5 alleged, but as to the remaining time share units, it has no claim. No basis exists for the trial court to  
 6 have found any genuine dispute exists as to the ownership of these time share units.

7 6. The determination of the identity of each separate owner, the fair market value of that  
 8 owner's time share unit and the value or amount of that owner's claim was properly before the trial  
 9 court only in an adversary proceeding pursuant to Bankruptcy Rule 7001, and not merely a motion  
 10 pursuant to Bankruptcy Rule 9013. Rule 7001 declares the following relevant actions to be adversary  
 11 proceedings:

12 ..."(2) a proceeding to determine the validity, priority, or extent of a lien or other  
 13 interest in property, other than a proceeding under Rule 4000(d) [relating to exempt property], and

14 "(3) a proceeding to obtain approval under §363(h) for the sale of both the interest of  
 15 the estate and of a co-owner of property...."

16 The Debtor did not comply with the requirements for instituting an adversary  
 17 proceeding, and therefore the court had no jurisdiction over interested parties, nor authority to enter  
 18 the order authorizing sale.

19 7. The Court incorrectly ruled that the case was not filed in bad faith. Debtor was  
 20 organized to hold title to the real property subject to the dispute herein. In bad faith, and in Order  
 21 avoid the limitations restricting a "single asset real estate" proceeding, Debtor purchased two  
 22 condominium units in Nevada which it rents out. Eleventh Circuit cases outline "circumstantial  
 23 factors" to be considered which may evidence bad faith filing. Here, Debtors meet at least four factors  
 24 which a court can use to hold that a filing under 11 USC was in bad faith. Although timely filing of  
 25 an action for dismissal due to a bad faith filing was not made by Appellants and that issue is not being  
 26 appealed, Debtor should not be rewarded by being allowed to auction real property (to which it has  
 27 only partial title) without adequate due process to other fee simple owners, to portions of the real  
 28 property Debtor wishes to sell at auction free and clear of the interests of those fee simple owners.

1           8. Further evidence of "bad faith" filing, not addressed by the Court, was the  
2 questionable loan given to Debtor and secured by the real property by an affiliated company of the  
3 Debtor. Debtors made no attempt to explain this loan, or the reason for it. Instead, Debtor claims that  
4 it is owned now by an employee of the company which once owned it, given to the new owner in  
5 return for his "management" of the real property.

6           9. Partition actions in Florida pursuant to Chapter 64, Florida Statutes, must be brought  
7 in the county in which the real property is located. Therefore, no bankruptcy court outside of the  
8 Middle District of Florida was authorized to sell the property in reliance on Chapter 64, Florida  
9 Statutes.

10          10. The trial judge has also authorized creditors (specifically the mortgage holder,  
11 Northstar) to bid in their claims. Such a procedure, however, is not permitted under Florida partition  
12 laws. Bidding in is permitted for mortgage foreclosure sales, but because the deed to Debtor, Silver  
13 Beach, LLC, specifically excepts and excludes the time share unit interests owned by third parties,  
14 Northstar will never eliminate these separate time share unit interests through foreclosure. Therefore,  
15 the trial court exceeded its discretion by authorizing creditors to receive credit for their cash claims  
16 against the Debtor.

## 17 CONCLUSION

18          11 U.S.C. Section 363 is intended to facilitate the sale of property in the debtor's estate to  
19 third parties free of the clutter of liens, joint interests and other encumbrances. Even the elimination  
20 of joint interests or liens must comply with Constitution standards for the deprivation of a person's  
21 property without due process. Section 363, however, does not reach out to property interests that are  
22 not owned at least in part by the debtor. In the present case separate units of real property, that have  
23 each been conveyed by warranty deed and have been specifically excluded by the deed to the debtor,  
24 have been drawn into this bankruptcy case and by motion have been ordered subject to involuntary  
25 sale. The motion and the order authorizing sale have failed to comply with the requirements of the  
26 Bankruptcy Code and Rules. Therefore, the Order Granting Debtor/Debtor-in-Possession, Silver  
27 Beach, LLC's, Motion for an Order Approving Auction Sale of Property Free and Clear of Liens,  
28

1 Claims and Interests, entered January 30, 2009, should be reversed.

2 DATED this 20<sup>th</sup> day of February, 2009.

3 ALBRIGHT, STODDARD, WARNICK  
4 & ALBRIGHT

5 By: 

6 G. MARK ALBRIGHT, ESQ.

7 Nevada Bar No. 001394

8 WHITNEY B. WARNICK, ESQ.

9 Nevada Bar No. 001573

10 SPENCER M. JUDD, ESQ.

11 Nevada Bar No. 010095

12 801 South Rancho Drive, Bldg. D

13 Las Vegas, NV 89106

14 (702) 384-7111 - Telephone

15 *Attorneys for Creditors, Robert Hey,*

16 *Cheryl Labosco, Michael Panaggio,*

17 *and Al Schmidt*

ASWA

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LAW OFFICES  
A PROFESSIONAL CORPORATION



**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and on the 20 day of February, 2009, I placed a true and correct copy of the foregoing **APPELLANTS' DESIGNATION OF RECORD ON APPEAL WITH STATEMENT OF ISSUES** in the United States mails at Las Vegas, Nevada, with first class postage prepaid, via first class mail, and addressed as follows:

Jeffrey R. Sylvester, Esq.  
James B. MacRobbie, Esq.  
Sylvester & Polednak, Ltd.  
7371 Prairie Falcon, Suite 120  
Las Vegas, Nevada 89128  
*Attorneys for Debtor, Silver Beach, LLC*

U. S. Trustee - LV - 11  
300 Las Vegas Boulevard South  
Suite 4300  
Las Vegas, Nevada 89101  
*Trustee*

David W. Huston, Esq.  
601 South Seventh Street, 2<sup>nd</sup> Floor  
Las Vegas, Nevada 89101  
*Attorneys for Creditor, Atlantic Northstar, LLC*

Deborah Deitsch-Perez  
3102 Oak Lawn Avenue  
Dallas, Texas 75219  
*Attorneys for Creditor, Atlantic Northstar, LLC*

  
An Employee of Albright, Stoddard,  
Warnick & Albright